Public Prosecutor v Zulkarnain bin Sani

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–97 OF 2004
NALLINI PATHAMANATHAN J
27 APRIL 2007

Criminal Procedure — Sentence — Dangerous drugs, possession of — Custodial sentence imperative in public interest — Dangerous Drugs Act, s 6

Criminal Procedure — Sentencing — Mitigating factors — Accused saved the time of the court and others involved — Whether court should take into account mitigating factor

The accused was originally charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), punishable under s 39B(2) of the same Act. Subsequently, the prosecution agreed to prefer an alternative charge under s 6 of the DDA, punishable under s 39A(2). On 23 February 2004, one Ahmad Sufi bin Mamat met with the accused to deliver approximately 400 gm of cannabis. This was kept in the accused's house in Gombak. On 26 February 2004, a chief inspector and his team entered the accused's home and after introducing himself, administered a caution in accordance with s 37A of the DDA. The accused subsequently led the chief inspector to the drugs, which were seized. The accused was arrested and the drugs sent to the chemist. It was found that there was 353.1 gm of cannabis and that the accused understood the nature and effect of the drugs and had custody and control of them. The accused pleaded guilty voluntarily and in full comprehension of the consequences of the plea. The court then convicted him. In mitigation, the accused pleaded the following: that he was only 28 years old, a first offender, he had pleaded guilty at an early stage, he had been fully cooperative with the police, the weight of the drugs was not large, he has and continues to undergo severe punishment and that he had been separated from his family. The Deputy Public Prosecutor (DPP) urged the court to consider, inter alia, the public interest.

Held:

(1) Section 39A(2) provides for a mandatory term of imprisonment for life or a term not less than five years, and a mandatory punishment of whipping of not less than ten strokes. The sentence imposed must fall within the ambit of this section and the assessment of the period of imprisonment must be undertaken in accordance with established judicial principles, ie, that of public interest (see para 13);

(2) While age is recognised as a mitigating factor, the court is entitled to disregard age when the offence involved is grave and where deterrence is the primary aim of the sentence (see para 19). In this case, it would not have been appropriate to take into account the age of the accused (see para 20).

(3) The accused in this case had no previous convictions. It is established practice that a first offender should receive some mitigation of sentence for most offences, save where the offence was serious when there was very little basis to give concession to this fact. This could be considered as a mitigating factor, although the extent to which this fact does so is restricted, as drug offences remain a serious national problem and public interest requires that deterrence remains the prevailing factor (see paras 21, 22).

(4) The weight of the cannabis had some bearing on the sentence. In the instant case, the weight of cannabis was 353.1 gm., approximately seven times the minimum weight provided for in s 39A(2) of the DDA (see para 25).

(5) The accused's co-operation with the police resulting in his immediate and voluntary surrender of the subject cannabis was another factor that accorded some mitigating value. This allowed for considerable savings in terms of the time taken for the investigation of this offence (see para 26).

(6) The accused's wrongdoing had far-reaching adverse effects on his family but could not be a factor that could reasonably be taken into account in mitigation (see para 27).

(7) The plea of guilt afforded the accused some measure of discount in the sentence to be imposed but as against this, the court recognised that it was not in every case that a discount or mitigation is entitled as of right. Where the offence is extremely grave, public interest outweighs the plea of guilt as a mitigating factor. A plea of guilt is recognised because it avoids the need for a trial. It also saves a considerable amount of judicial time and costs besides saving victims and witnesses from the concern of having to give evidence at trial. In the instant case, the circumstances were not so grave as to justify the plea of guilt being ousted in favour of public interest (see paras 29–32).

(8) The accused had pleaded guilty at an early stage of the proceedings. Therefore rather than the full one-third that would have had been appropriate if he had pleaded earlier, a reduction of one-quarter was more appropriate (see para 33).

(9) The appropriate sentence to be passed was a term of imprisonment of nine years and whipping of ten strokes which sentence was to take effect from the date of his arrest (see para 37).

[Bahasa Malaysia summary

Tertuduh pada awalnya telah dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (ADB), yang boleh dihukum di bawah s 39B Akta yang sama. Kemudiannya, pihak pendakwaan telah bersetuju kepada pertuduhan pilihan di bawah s 6 ADB, yang boleh dihukum di bawah S 39A(2). Pada 23 Februari 2004, seseorang yang bernama Ahmad Sufi Bin Mamat telah berjumpa dengan tertuduh untuk menyerahkan sekurang-kurangnya 400 gm kanabis (ganja). Pada 26 Februari 2004, chief inspektor dan pasukannya telah memasuki rumah tertuduh dan selepas memperkenalkan dirinya, melaksanakan amaran menurut s 37A ADB. Tertuduh kemudiannya telah menunjukkan chief inspektor kepada dadah-dadah tersebut, yang mana telah dirampas. Tertuduh telah ditangkap dan dadah-dadah tersebut telah dihantar kepada ahli kimia. Ia telah mendapati bahawa terdapat

353.1 gm kanabis (ganja) dan tertuduh memahami keadaan dan kesan dadah-dadah tersebut dan simpanan serta kawalan ke atasnya. Tertuduh telah mengaku salah secara sukarela dan memahami sepenuhnya kesan-kesan ke atas pengakuannya. Mahkamah kemudiannya telah mensabitkannya. Dalam pengurangan hukumannya, tertuduh mendakwa seperti berikut: bahawa dia berumur 28 tahun, pesalah pertama, dia telah mengaku salah pada peringkat permulaan, dia telah memberikan kerjasama penuh dengan pihak polis, berat kandungan dadah-dadah tersebut adalah tidak besar, dia memang dan akan terus menjalani hukuman berat dan ia akan terpisah daripada keluarganya. Timbalan Pendakwaraya (TP) mendesak mahkamah untuk mempertimbangkan, antara lain, kepentingan awam.

Diputuskan:

(1) Seksyen 39A(2) menyediakan tempoh mandatori penjara seumur hidup atau tempoh tidak kurang dari lima tahun, dan hukuman mandatori sebatan tidak kurang daripada sepuluh rotan. Hukuman yang dikenakan hendaklah di dalam lingkungan seksyen ini dan penilaian tempoh hukuman penjara hendaklah diambilkira berdasarkan kepada prinsip keadilan sedia ada iaitu berkenaan kepentingan awam (lihat perenggan 8);

(2) Walaupun umur diambilkira sebagai faktor pengurangan, mahkamah berhak untuk mengabaikan faktor umur bila kesalahan yang terlibat adalah amat berat dan bila pencegahan adalah sasaran utama kepada hukuman (lihat perenggan 12). Dalam kes ini, ia adalah tidak sesuai untuk mengambil kira umur tertuduh (lihat perenggan 13).

(3) Tertuduh dalam kes ini tidak mempunyai sabitan lampau. Ia adalah amalan sedia ada bahawa pesalah pertama akan menerima pengurangan hukuman dalam kebanyakkan kesalahan., melainkan bila kesalahan adalah terlalu serius dan terdapat sedikit asas untuk berkompromi dengan fakta ini. Ia dianggap sebagai faktor pengurangan, walaupun takat fakta ini adalah sangat terhad, memandangkan kesalahan dadah adalah masalah negara yang sangat serius dan kepentingan awam berkehendakkan pencegahan sebagai sesuatu yang sepatutnya diamalkan (lihat perenggan 13-14).

(4) Berat kanabis mempunyai pengaruh ke atas hukuman. Dalam kes ini, berat kanabis adalah 353.1 gm, lebih kurang tujuh kali berat minimum yang diperuntukkan dalam s 39A(2) Akta tersebut (lihat perenggan 16).

(5) Kerjasama yang diberikan oleh tertuduh kepada pihak polis telah menyebabkan beliau menyerahkan dengan cepat dan sukarela kananbis adalah faktor lain yang membawa kepada nilai pengurangan. Ini telah menyebabkan penjimatan dalam konteks masa yang diambil untuk penyiasatan kesalahan ini. (lihat perenggan 16-17).

(6) Kesalahan tertuduh menyebabkan kesan buruk luar jangkauan kepada keluarganya., tetapi tidak boleh menjadi faktor yang akan dipertimbangkan dalam pengurangan (lihat perenggan 17).

(7) Pengakuan bersalah memberi tertuduh langkah potongan dalam hukuman yang akan dikenakan tetapi bertentangan dengan ini, mahkamah memperakui

bahawa tidak semua kes potongan dan pengurangan diberikan semata-mata kerana hak mereka. Bila kesalahan adalah terlalu serius, kepentingan awam akan mengatasi pengakuan bersalah sebagai faktor pengurangan. Pengakuan bersalah diperkenalkan kerana ia mengelakkan keperluan untuk perbicaraan. Ia juga dapat menjimatkan banyak masa kehakiman dan kos disamping menyelamatkan mangsa-mangsa dan saksi-saksi daripada kebimbangan memberikan keterangan semasa perbicaraan. Dalam kes ini, keadaan-keadaan adalah tidak terlalu serius untuk menjustifikasikan pengakuan bersalah telah menyingkirkan kepentingan awam (lihat perenggan 19).

(8) Tertuduh telah mengaku salah pada peringkat awal prosiding. Oleh itu, selain daripada satu pertiga penuh yang mana adalah sesuai jika dia mengaku sebelumnya, pengurangan satu perempat adalah nampaknya lebih sesuai (lihat perenggan 20).

(9) Hukuman yang sesuai sepatutnya diputuskan adalah tempoh hukuman penjara selama 9 tahun dan 10 kali sebatan dengan hukuman akan berkuatkuasa dari tarikh tangkapan (lihat perenggan 22).]

Notes

For cases on possession of dangerous drugs, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3348-3355.

For cases on mitigating factors, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3574–3605.

Cases referred to

Ang Chai Seng v PP [2000] 2 MLJ 35 (refd)
Jessica Lim v PP [2004] 2 CLJ 763 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
Mohamad Radzi bin Abu Bakar v PP [2002] 3 MLJ 593 (refd)
Mogan Maruthamtuhu v PP [2003] 5 CLJ 118 (refd)
PP v Hairul Din bin Zainal Abidin [2001] 6 MLJ 146 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Maruthamuthu [2007] 7 CLJ 368 (refd) (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
PP v Sharifah Syed Hashim [2006] 6 CLJ 503 (refd)
PP v Teh Ah Cheng (refd) [1976] 2 MLJ 186 (refd)
PP v Tia Ah Leng [2000] 5 MLJ 901 (refd)
R v Kenneth John Ball [1951] 35 Cr App R 164 (refd)
R v Sargeant [1974] 60 Cr App R 74 (redf)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Soosainathan v PP [2001] 2 MLJ 377 (refd)
Subramaniam a/l Arumugam v PP [2000] 2 MLJ 193 (refd)
Surentheran a/l Selvaraja v PP [2006] 1 MLJ 641 (refd)
Tay Bok Yeng v PP [1972] 1 MLJ 214 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 37A, 39A(2), 39B(1),(a), (2)

DPP Awang Ahmadjaya (AG's Chambers) for the Public Prosecutor.
Ghazali bin Taib (Noor Ghazali & Co) for the accused.

Nallini Pathmanathan JC:

INTRODUCTION

[1] Zulkarnain bin A Sani ('the accused') was originally charged with trafficking in 353.1gm of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the same Act. He pleaded not guilty and claimed trial to the charge. However, after four prosecution witnesses had given their evidence in the course of one day of trial, I was advised that as a consequence of the accused's representation made through his counsel, the prosecution had agreed to prefer an alternative charge against the accused for possession of the same quantity of cannabis, under s 6 of the DDA, which is punishable under s 39A(2) (in this context it is relevant to note that the accused had, in early 2005, been charged under both s 39B(1)(a) and alternatively under s 6 of the DDA. On 13 April 2005 the accused pleaded guilty to this alternative charge but shortly afterwards indicated through his counsel that he wished to withdraw his plea of guilt and wanted to plead not guilty to the original charge under s 39B(1)(a). Accordingly, the alternative plea was withdrawn).

[2] [2] An alternative plea was then tendered as follows:

> Bahawa kamu pada 26 hb Februari 2004 jam lebih kurang 9 malam di alamat Lot 3194A, Kampung Kerdas, Batu 5 1/2 Gombak, di dalam daerah Gombak, di dalam negeri Selangor Darul Ehsan telah di diapati di dalam milikan kamu dadah berbahaya ia itu Cannabis seberat 353.1 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 dan boleh di hukum di bawah s 39A(2) Akta yang sama.

[3] I ascertained that the accused fully understood the nature and the consequences of the alternative plea and was satisfied that he did.

FACTS OF THE CASE

[4] Briefly, the facts are that on the 23 February 2004 at about 2 pm one Ahmad Sufi bin Mamat went to the meet the accused at his newly rented house at Lot 3194A, Kampung Kerdas, Batu 5 1/2 Gombak ('the premises') to hand over/deliver approximately 400 gm of cannabis. The accused received and kept the said quantity of cannabis in this house.

[5] On 26 February 2004, at about 9 pm one Chief Inspector Loi Yew Lik and his team of police officers conducted an ambush/surveillance on the premises. Chief Inspector Loi knocked on the front door of the premises and entered the house. He found the accused and a friend, one Azizi bi Miswadi sitting on the floor on a carpet in the hall, watching television. Chief Inspector Loi introduced himself and

administered a caution in accordance with s 37A of the DDA. The accused and Azizi were then asked whether they had in their possession anything in contravention of the law. In response, the accused led Chief Inspector Loi to his bedroom and took out from between the layers of clothing in his cupboard, a bundle of newspaper with a rubber band around it, which was wrapped in a plastic bag with the trade name 'Giant' on it:- Exhibits P-10 and P-l. The accused opened this package and removed a block of some dried plant. (Exhibit P-23–P-25). Apart from this, the accused also handed over a cream coloured covered plastic container, Exhibit P-13, that was filled with 11 small plastic packets containing dried plants (Exhibits P26 A-K). All of this was seized by Chief Inspector Loi. In addition other possessions of the accused were also seized. Azizi, the accused's friend, told the police that he had only come to visit the accused and had no knowledge of the existence of the drugs found there.

[6] The accused was then arrested and taken to the police station at Gombak while the seized packages were sent to the chemist for analysis. The chemist confirmed vide his report, P-19, that the packages contained a total of 353.1 gm of cannabis. The police investigation showed that the said quantity of cannabis belonged to the accused who understood the nature and effect of the drugs and had custody and control of the same. The accused admitted the facts as adduced by the prosecution in P-18 as being true, as well as the exhibits which had been seized from his possession as above, and other exhibits.

[7] I have read the facts, seen the exhibits and considered the evidence as a whole particularly the chemist's report and am satisfied that an offence under s 6 of the DDA, punishable under s 39A(2) was committed.

[8] On these facts, the accused pleaded guilty. This was done voluntarily in full comprehension of the consequences of the plea. I therefore accepted his plea of guilt under s 6 of the DDA, which is punishable under s 39A(2),and convicted him.

ACCUSED'S PLEA IN MITIGATION

[9] The accused put forward several grounds in support of his plea of mitigation through his counsel, Tuan Ghazali bin Taib. He urged the Court to take into consideration the following facts:

(a) He is only 28 years old;

(b) This was his first offence; he expressed remorse and maintained that he would not get involved in any like activities involving drugs or any form of crime in the future;

(c) He had pleaded guilty at a very early stage of the trial; and by virtue of his plea, considerable and valuable judicial time had been saved, not to mention costs and the inconvenience spared to witnesses, the police and prison authorities who would otherwise have had to make the time to be present and available in court for trial;

(d) He had been fully co-operative with the police from the moment they had entered his house. He had not attempted to run away or disguise his possession of the drugs and had, in fact, gone on to make full disclosure and surrender the cannabis in his possession;

(e) The weight of the drugs comprising the subject-matter of the charge was not an especially large quantity;

(f) He has and continues to undergo severe punishment since the date of his arrest on 26 February 2004 in that he has been separated by his imprisonment from his wife, children and parents; he has a wife and four children aged between four and ten years. His family he says has undergone untold misery and hardship in that they have been torn apart as they have not had a source of livelihood. As a consequence of his imprisonment, the children have been forced to live with various relatives. The accused wishes to take on full responsibility for his children and make whole once again his family unit that has been torn apart by his wrongdoing.

[10] On these grounds, in summary, he appealed to the Court for a light sentence.

PROSECUTION'S RESPONSE

[11] The learned Deputy Public Prosecutor concurred that the accused was a first offender with no previous convictions. He urged the Court to place on the scales of justice the public interest in terms of its ongoing fight against the scourge of drugs, and balance against it the private interests of the accused. He stressed that the sentence handed down would be a message conveyed by the Court to the world at large as to the gravity with which drug related offences were viewed.

[12] The Deputy Public Prosecutor went on to add that relevant considerations included:

(a) The quantity of drugs found in the possession of the accused;

(b) The circumstances of the case, for example whether it concerned a wider ring or network of drug abuses;

(c) The personal character of an accused in terms of his age, conduct, the degree of co-operation shown to the police and whether there was damning evidence of other illegal activities connected with the drugs.

SENTENCE

Public Interest

[13] Section 39A(2) dictates the statutory ambit within which the Court may hand down a sentence in this case. It provides for a mandatory term of imprisonment for life or a term not less than five years, and a mandatory punishment of whipping of not less than ten strokes. Therefore the sentence imposed must fall within the ambit of this section and the assessment of the period of imprisonment must be undertaken in accordance with established judicial principles (*PP v Tia Ah Leng* [2000] 5 MLJ

901). The governing or overriding principle which the court should have foremost in its mind when making an assessment as to an appropriate sentence, is that of public interest. As stated in the locus classicus on this point, *R v Kenneth John Ball* (1951) 35 Cr App R 164:

> ... In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to the honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe...

[14] Broadly stated, public interest requires the punishment of offenders, the reduction of crime (albeit by deterrence or by reform and rehabilitation of offenders) and the protection of the public. As stated in the renowned case of *R v Sargeant* [1974] 60 Cr App R 74 by Lawton J:

> ... society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect the public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.

[15] Public interest however varies according to the nature and prevalence of a particular offence, not to mention the time, place and circumstances of each particular case. What then best prescribes the public interest in an offence which relates to the possession and abuse of dangerous drugs? It is an offence that is prevalent, of particular gravity and difficult to deter. The media reports on an almost daily basis of drug taking and trafficking. It is a menace which has not been subdued over the years despite the greater penalties imposed by the legislature in an effort to overcome this national problem. As such public interest lies in deterring the further escalation of drug offences. And the courts can demonstrate their abhorrence of this type of crime by prescribing deterrent sentences. In *Ang Chai Seng v PP* [2000] 2 MLJ 35, Haidar JCA put it thus:

> ... It has to be noted that the legislature had thought it fit to increase the punishment for offences under s 39A(2) of the Act from a maximum of 14 years' imprisonment to life imprisonment and the minimum term of imprisonment from three years to five years and the minimum strokes increased from six to ten strokes. The legislative exercise therefore denotes the government's concern of the problem of drug abuse in this country 'the degenerating, effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself per Hashim Yeop Sani J (as he then was) in *PP v Loo Choon Fatt* [1976] 2 MLJ 256. Unless the courts take a firm stand in such offences the whole purpose of the legislature in increasing the punishment under s 39A(2) of the Act would be lost...

[16] And earlier in *PP v Loo Choon Fatt* [1976] 2 MLJ 256, Hashim Yeop Sani J said:

> ... The amendments passed by Parliament therefore reflect the public policy. It must be presumed that behind the public policy is the consideration of public interest …

[17] There is therefore a clear legislative signal that offences of this nature are not to be dealt with lightly and the imposition of a sentence should mirror the gravity with which such drug related offences are viewed. To do otherwise would be to defeat the object of the legislation (*PP v Tia Ah Leng* [2000] 5 MLJ 901). Bearing in mind this principle/tenet as the being the prime consideration in assessing an appropriate sentence, the individual case has then to be considered on its merits.

FACTORS TO BE CONSIDERED IN THIS CASE

[18] The facts available for consideration in this case are as set out by the prosecution in P-18 and the plea in mitigation put forward in P-28. From this it is apparent that the accused is a first offender who was fully co-operative with the police and surrendered the cannabis in his possession on arrest. His role in coming into possession and keeping the said quantity of drugs was not clear. However the weight of the drugs found in his possession, being seven times the statutory limit does not support the inference that he kept it for his own consumption. Finally the accused pleaded guilty at a relative early stage of the proceedings.

MITIGATING FACTORS

Youthful Offender

[19] The accused was 25 years old at the time of commission of the offence. While age is recognised as a mitigating factor, the court is entitled to disregard age when the offence involved is grave and where deterrence is the primary aim of the sentence. In *Tay Bok Yeng v PP* [1972] 1 MLJ 214 where the offence was robbery and the accused aged 20, Sharma J held that notwithstanding that the law does provide for a lesser sentence when the offender is young, youth had allowed for a certain species of crime to evolve which required the 'alacrity of mind and body, the dare, dash and defiance of youth...'. As a consequence His Lordship concluded that age had to give way to public interest, in that the need to have a deterrent sentence to discourage other youth from committing such offences, far outweighed the individual interests of the accused in terms of his age. And in *PP v Teh Ah Cheng* [1976] 2 MLJ 186, where the offence was the possession of firearms and ammunition, Abdoolcadeer J also concurred that youth was not a mitigating factor to be taken into account as he graphically described the consequences of so doing as follows:

> … If age alone were the sole determining factor in the severity of punishment in offences involving firearms and for not imposing a corrective custodial sentence, then it may not be impossible to envisage the horrifying spectacle of the community having on its hands and its midst an unrestrained brood of gun- toting pistol-packing prone thugs of tender years on the prowl with dubious intent and running round lose on the strength of bonds of

A questionable efficacy equipped with the potential and perhaps even the inclination to put such offending objects to actual use with resultant terror, bodily harm and loss of life...

[20] While these cases do not deal with offences related to drugs, they provide clear guidelines that youth in itself, does not displace or allow for a reduction in sentence B as of right where the offence is a serious menace to society, as is the case with possession and abuse of drugs. In these circumstances it would not be appropriate to take into account the age of the accused in this case as a mitigating factor.

First Offender

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[21] It is not in dispute that the accused in this case has no previous convictions. Again it is established practice that a first offender should receive some mitigation of sentence for most offences, save where the offence is serious when there is very little basis to give concession to this fact. In *PP v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146, where the accused was found guilty of an amended charge of possession D of 953.2 grams of cannabis, his plea in mitigation was simply a statement of his age, his marital status and the fact that he was a first offender. Augustine Paul J (as His Lordship then was) took into account that it was a first offence when sentencing the accused to a term of ten years and whipping of ten strokes. The accused appealed and the Court of Appeal dismissed his appeal affirming both conviction and sentence, E concluding that the trial judge had applied the correct principle of sentencing.

[22] It would therefore appear that the fact that the accused in the instant case is a first offender can be considered as a mitigating factor, although the extent to which this fact does so is restricted, as drug offences remain a serious national problem and F public interest requires that deterrence remains the prevailing factor.

Weight of the Drugs

[23] Does the quantity of the drugs in the possession of the accused play a part in G assessing sentence? It would appear so. In *PP v Tia Ah Leng* [2000] 5 MLJ 901, Augustine Paul J (as His Lordship then was) said:

> ... The seriousness of the drug menace must therefore be reflected in the sentence, depending on the circumstances of the case, so that the requirements of public interest can be served effectively. The corollary is a determination of whether the quantity of drugs H involved in cases of drug abuse ought to affect the sentence to be passed in view of the fact that different penalties are prescribed in the Act dependent on the weight involved. I had the occasion to consider this aspect of sentencing in drug cases in *Zaidon Shariff v PP* [1996] 4 CLJ 441 where I said at pp 446-447:
>
> '... In my opinion the learned Magistrate's view that drug offences require a deterrent I sentence is too wide and broad a statement. The appropriate sentence for each drug offence depends on its own peculiar circumstances. In particular the weight of the drugs found on a person plays a significant role in assessing sentence. In Oloofen v PP [1964] MLJ 305 Wee Chong Jin CJ emphasized the consideration to be given to the quantity of drugs involved in drug offences in assessing sentence. The same guideline applies even to more serious drug offences. In PP v Ang Soon Huat (Mallal's Digest 4th Ed 1994 Reissue Vol 5 No. 2378) it

was held that in drug trafficking cases the sentence should be proportionate to the gravity of the offence, which is the quantity of the drugs that was being trafficked. This is also manifested by the fact that the Dangerous drugs Act 1952 itself prescribes different penalties for drug offences depending on the weight of drugs involved …'

[24] In *Surentheran a/l Selvaraja v PP* [2006] 1 MLJ 641 at 647, Abdul Aziz Mohamad JCA (as His Lordship then was) said:

... There seems to be a statutory policy of grading the severity of penalty according to the amount of drug. Bearing that in mind, no matter how important are such questions as that of public interest, in a case that does not have aggravating or suchlike circumstances, such as a previous conviction - and the appellant does not have a previous conviction — the sentence of imprisonment must, as far as possible, though not necessarily with mathematical accuracy, be made to adhere to that policy. It would be manifestly wrong, for example, although allowed by s 39A(2)(d) to sentence a first offender to life imprisonment for possession of a mere 5 grammes, as it would be manifestly wrong, although so allowed, to sentence an offender, even though a first offender to only five years for possession of 14.999 grammes, in the absence of special mitigating circumstances...

[25] As such the weight of the cannabis should have some bearing on the sentence. In the instant case, the weight of cannabis was 353.1 gm., approximately seven times the minimum weight provided for in s 39A(2) of the DDA.

Accused's co-operation with the police

[26] The accused's ready co-operation with the police from the time they entered his premises and questioned him resulting in his immediate and voluntary surrender of the subject cannabis is another factor that should be accorded some mitigating value. This allowed for considerable savings in terms of the time taken for the investigation of this offence.

Hardship suffered by the accused and his family

[27] While it is indeed regrettable that the accused's wrongdoing should have such far-reaching adverse effects on his young family who can bear no blame for their current hardship, this is not a factor that can reasonably be taken into account in mitigation. I can do no better than to refer to *PP v Loo Choon Fatt* where Hashim Yeop Sani J (as he then was) said:

... Presidents and Magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will normally bring up problems of family hardship and other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible between the interests of the public and the interests of the accused...

[28] The hardship suffered by the accused's family and the accused has arisen by reason of the accused's imprisonment, for which only the accused can take blame.

The Plea of Guilt by the Accused

[29] The general rule is that a plea of guilt affords the accused some measure of discount in the sentence to be imposed. In *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, it was held that a plea of guilt entitled the accused to a discount of one-third to one-quarter of the sentence. A failure on the part of a judge to grant credit or discount may be construed as the judge not exercising his discretion in sentencing judicially (see *Soosainathan v PP* [2001] 2 MLJ 377). This was followed in in *PP v Ravindran & Ors* [1993] 1 MLJ 45, where Visu Sinnadurai J pointed out that the credit or discount to be given in favour of the accused person is not on the maximum sentence imposed by law but on the sentence that is likely to have been passed if the accused had claimed trial and been found guilty.

[30] As against this, the Courts have also recognised that it is not in every case that a discount or mitigation is entitled as of right. Where the offence is extremely grave, the courts have determined that public interest outweighs the plea of guilt as a mitigating factor, in which instance it will not be taken into account. In *PP v Tia Ah Leng* [2000] 5 MLJ 901 for example the quantity of drugs was so large that this was considered a sufficient menace to warrant public interest prevailing over the plea of guilt of the accused. Accordingly, the court imposed the maximum term of imprisonment and the Court of Appeal upheld this decision.

[31] A plea of guilt is generally recognised as a factor justifying a reduction in sentence because it avoids the need for a trial (see *Sau Soo Kim v PP* [1975] 2 MLJ 134), thus enabling other cases to be disposed of more expeditiously. It also saves a considerable amount of judicial time and costs besides saving victims and witnesses from the concern of having to give evidence at trial. It also shortens the gap between the time of preferment of the charge and sentence, thereby alleviating delays and encouraging the effective administration of justice.

[32] In the instant case, the circumstances are not so grave as to justify the plea of guilt being ousted in favour of public interest.

Stage of Proceedings at which the Accused Pleaded Guilty

[33] The accused in the instant case pleaded guilty at a relatively early stage of the proceedings, ie, very soon after the commencement of trial, although not at the first opportunity available to him. Therefore rather than the full one-third that may well have been appropriate should he have pleaded guilty earlier, a reduction of one-quarter may well be more appropriate.

[34] It is now necessary to consider the sentence that would have been imposed had the accused claimed trial to the alternative charge under s 6, punishable under s 39A(2), and been found guilty.

Comparison of Sentences in Other Cases for a Similar Offence

[35] The courts have imposed varying sentences for like or approximate quantities over the years. At the appellate level, sentences have varied from terms of imprisonment of 18 years and ten strokes for a quantity of 342.1 gm of cannabis (*Mohamad Radzi Bin Abu Bakar v PP* [2002] 3 MLJ 593) to ten years and ten strokes of whipping for possession of 251.06 gm of cannabis (*Subramaniam a/l Arumugam v PP* [2000] 2 MLJ 193) and again ten years and ten strokes for the possession of 953.2 gm (*PP v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146). At the High Court level, sentences have varied from six years and ten strokes for possession of 101.488 grams of methamphetamine (*Jessica Lim v PP* [2004] 2 CLJ 763), seven years and ten strokes for possession of 1037.9 gm of cannabis (*PP v Maruthamuthu* [2007] 7 CLJ 368), and seven years for possession of 739 gms of cannabis (*PP v Sharifah Syed Hashim* [2006] 6 CLJ 503) and seven and a half years for *Mogan Maruthamtuhu v PP* [2003] 5 CLJ 118 where the quantity was 197.89 gms. The instant case is closest by comparison to the appellate decisions in *Mohd Radzi* and *Subramaniam* while at the High Court level *PP v Maruthamuthu* is the closest in terms of weight. In *Mohd Radzi and Subramaniam* however, the accused had both been found guilty of trafficking and their charges were reduced at the appellate level to possession.

[36] The term of imprisonment imposed for possession of cannabis of a quantity that similar to that in the present case appears to range from seven to eighteen years depending on the facts of each individual case.

[37] In the instant case, if the accused had claimed trial and been found guilty, it is likely that I would have imposed a sentence of twelve years imprisonment and ten strokes of whipping, taking into account public interest, the gravity of the offence, the facts of the case, the weight of the drugs found in the possession of the accused, the fact that he is a first offender and his ready co-operation extended to the police when he was apprehended and questioned. Taking into further consideration the plea of guilt and the relatively early stage at which the accused pleaded guilty, the appropriate sentence to be passed on the accused in this case is a term of imprisonment of nine years and whipping of ten strokes which sentence is to take effect from the date of his arrest.

Sentence to imprisonment for nine years and whipping of ten strokes.

Reported by Kenny Wong